STATE OF MICHIGAN

IN THE SUPREME COURT

In Re Complaint of Enbridge Energy, Limited Partnership against Upper Peninsula Power Company,

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,
Petitioner-Appellee,

v

UPPER PENINSULA POWER COMPANY,
Respondent-Appellant,

and MICHIGAN PUBLIC SERVICE COMMISSION,
Appellee.

Supreme Court No. 153116
Court of Appeals No. 321946
PSC Case No. U-017077

/

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/

SUPPLEMENTAL BRIEF OF PETITIONER-APPELLEE ENBRIDGE ENERGY, LIMITED PARTNERSHIP

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STATEMENT OF PROCEDURE

Pursuant to this Court's October 7, 2016 *Order*, Enbridge Energy, Limited Partnership ("Enbridge"), through its attorneys, Clark Hill PLC, offers this *Supplemental Brief* in connection with Enbridge's opposition to the applications for leave to appeal filed by Upper Peninsula Power Company ("UPPCo") and the Michigan Public Service Commission (the "Commission," or the "PSC"), in Supreme Court Nos. 153116 and 153118, respectively.

QUESTIONS INVOLVED

I. Whether the Court of Appeals erred in holding that the analysis provided in *Dodge v Detroit Trust Co*, 300 Mich 575, 613 (1942), was relevant to the determination of whether the PSC exceeded its statutory authority by enforcing a settlement agreement that included a revenue decoupling mechanism for an electric utility.

Petitioner-Appellee Enbridge says:	No Court of Appeals error.
Respondent-Appellant/Appellee UPPCo probably says:	Yes.
Appellee/Appellant PSC probably says	Yes.

II. If *Dodge* applies, whether the petitioner, Enbridge, was barred from arguing that the settlement agreement is unenforceable or void.

Plaintiff-Appellee Enbridge says:	No.
Respondent-Appellant/Appellee UPPCo probably says:	Yes.
Appellee/Appellee PSC probably says:	Yes.

III. Whether the petitioner, Enbridge, is procedurally barred from challenging the PSC's prior orders when it failed to intervene in certain cases or appeal from the orders.

Plaintiff-Appellee Enbridge says:	No.
Respondent-Appellant/Appellee UPPCo probably says:	Yes.
Appellee/Appellant PSC probably says:	Yes.

SUPPLEMENTAL BRIEF OF PETITIONER-APPELLEE ENBRIDGE ENERGY, LIMITED PARTNERSHIP

Enbridge states as follows for its *Supplement Brief* in opposition to the applications filed by UPPCo and the PSC for leave to appeal *Opinion and Order* issued by the Court of Appeals in favor of Enbridge to this Court in the above-captioned matter:

INTRODUCTION

This case involves an effort by an electricity ratepayer, aggrieved by an order of the PSC raising utility rates, to hold the PSC and electric utility UPPCo to the lawful limits of electric ratemaking authority established by the Michigan Legislature in MCL 460.1097(4) pursuant to Public Act 295 of 2008. The Court of Appeals decided this case narrowly, as a matter of straightforward statutory interpretation giving effect to the intent of the Legislature, rather than bending to the will of a limited number of parties and the settlement agreement they entered before a regulatory agency without authority to approve electric utility rate increases based on the proposed pilot revenue decoupling mechanism ("RDM") in the settlement.

Upon review of the applications for leave to appeal file by UPPCo and the PSC, and Enbridge's answers to those applications, this Court considered the applications and directed the parties to file supplemental briefs on three discrete issues, with leave to address additional issues.[1]

There are no factual disputes in this case. Enbridge relies on the counter-statement of facts it presented in its answers and briefs in support filed with this Court, and expressly incorporates those by reference here, though further reference to the record will be included here as necessary. This Court should determine that UPPCo's and the PSC's applications for leave to

[1] *Order*, October 7, 2016, at 2.

appeal the December 21, 2015 *Opinion and Order* of the Court of Appeals be denied, for the reasons previously stated by Enbridge and for those set forth below.

COUNTER-STATEMENT OF FACTS

Petitioner-Appellee Enbridge relies upon its Counter-Statement of Facts filed with its *Answer and Brief in Support* filed in each of these two related proceedings on March 1 and 2, 2016,[2] and expressly incorporates the same by reference concerning: (i) the parties: (ii) the three PSC dockets at issue in this matter (Nos. U-15988, U-16568, and U-17077); and (iii) the decision of the Court of Appeals in the matter of *In re Applications of Detroit Edison*.

Given the issues the Court has directed the parties to brief, it is worth noting that neither the PSC nor UPPCo cross-appealed any portion of the PSC's May 14, 2014 Order in U-17077, including the portions where the PSC determined that Enbridge's Complaint complied with PSC Rule 501 and found moot UPPCo's and the PSC Staff's arguments that Enbridge failed to timely intervene or appeal the Orders in Case No. U-16568.

Given those issues, mention of the December 22, 2015 Court of Appeal *Opinion and Order* in this matter is worthwhile. The Court of Appeals issued its decision in favor of Enbridge, overturning the PSC's upholding of the Settlement Agreement and dismissal of Enbridge's Formal Complaint by way of a published opinion with a single holding:

> We hold that the PSC erred when it upheld the settlement agreement in the prior case and dismissed Enbridge's compliant in the instant case.[3]

The Court of Appeals, after explaining the basis for its holding and distinguishing authority relied upon by UPPCo and the PSC, and summarizing its opinion that the PSC exceeded its clear statutory authority by approving the RDM in U-16568, also stressed "that our holding is based

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[2] UPPCo is Respondent-Appellant in Supreme Court No. 153116 and Respondent-Appellee in No. 153118. The PSC is Appellee in No. 153116 and Appellant in No. 153118. Enbridge is Petitioner-Appellee in both proceedings.

[3] *Enbridge*, 313 Mich App 669, 675; 884 NW2d 581 (2015).

on the fact that reasonable minds could not have disputed the extent of the PSC's authority at the time it approved the settlement agreement," in 2010.[4]

The Court of Appeals explained the basis for its holding by quoting the statute adopted by the Legislature that speaks to PSC action related to rate decoupling for electric utilities, and recounting the analysis that supported the *Detroit Edison* decision:

> The statute in question governing RDMs for electric utilities is MCL 460.1097(4), which provides as follows:
>
> > Not later than 1 year after the effective date of this act, the commission shall submit a report on the potential rate impacts on all classes of customers if the electric providers whose rates are regulated by the commission decouple rates. The report shall be submitted to the standing committees of the senate and house of representatives with primary responsibility for energy and environmental issues. The commission's report shall review whether decoupling would be cost effective and would reduce the overall consumption of fossil fuels in this state.
>
> As we have explained in *Detroit Edison,* this "provision mandates research and reporting on how RDMs would operate in connection with providers of electricity, *but does not call for or authorize actual implementation of an RDM by those utilities*." *Detroit Edison,* 296 Mich App at 109 (emphasis altered from original). As the *Detroit Edison* Court noted, this provision for electric utilities is in stark contrast to MCL 460.1089(6), which expressly allows the PSC to approve RDMs for *gas* utilities. *Id.* at 110; see also *French v Mitchell,* 377 Mich 364, 384; 140 NW2d 426 (1966) ("[W]hen the legislature has used certain language in one instance and different language in another, the indication is that different results were intended."). Thus, there is no question that the PSC did not have the authority to implement the RDM for UPPC, an electric utility, in the instant case.[5]

The Court of Appeals also explained the distinctions that led it to conclude that the PSC's reliance on *Dodge* was misplaced. Before doing so, the Court of Appeals described that the

[4] *Enbridge*, 313 Mich App at 677.
[5] *Id* at 675-676.

parties to the settlement agreement in *Dodge* were involved in a will contest that resolved a disputed legal issue that *one party* to the settlement tried to challenge after 17 years because of an intervening change in the law, and stated that the Supreme Court in *Dodge* "noted that there was no lawful basis to allow a party to invalidate a settlement where there was 'an honest dispute between competent legal minds' regarding the status of the law at the time of the settlement,"[6] and quoted the following passage:

> Where a *doubt as to what the law is* has been settled by a compromise, a subsequent judicial decision by the highest court of a jurisdiction upholding the view adhered to by one of the parties affords no basis for a suit by him to upset the compromise. [*Id.* (emphasis added).][7]

The Court of Appeals offered its explanation of the distinctions between the undisputed facts in this matter and those in *Dodge* as the two primary reasons for the PSC's misplaced reliance on *Dodge*.

In doing so, the Court of Appeals distinguished *Dodge*, describing it as "inapposite,"[8] a word defined as "not pertinent."[9] Given the definition of "apposite," as "suitable, appropriate,"[10] then "inapposite" means not "suitable" or not "appropriate."

There were two reasons that the Court of Appeals determined that *Dodge* was not pertinent – or relevant – to resolution of this proceeding. First, there was no intervening change in the law in the instant case, because in MCL 460.1097(4) has not been changed since its adoption by the Legislature in 2008. The Court of Appeals stated that "the act's language is unmistakably clear, and it was not reasonable to believe that the law was in dispute or otherwise unclear" with respect to the fact that the PSC was prohibited from approving RDMs for electric

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[6] *Enbridge*, 313 Mich App at 676.
[7] *Id* at 676-677 (emphasis and bracketed text added by Court of Appeals).
[8] *Enbridge*, 313 Mich App at 677.
[9] See http://www.dictionary.com/browse/inapposite?s=t , last accessed November 9, 2016.
[10] Black's Law Dictionary 110 (8th ed. 2004).

utilities, unlike for gas utilities.[11] Second, the Court of Appeals highlighted the fact that *Dodge* involved only a limited number of private parties who only themselves were bound by the settlement agreement, but in the instant case it is undisputed that "settlements in the regulatory context carry the force of law and necessarily bind *all* customers in the affected area, even those who were not a party to the settlement."[12] The Court of Appeals also referenced authority from the Indiana Court of Appeals which explains that that such a settlement loses its status as a private contract and becomes more akin to an order of the commission, concluding that

> As a result, the strong public policy in behind the long-standing doctrine that requires people to be bound by their settlements, simply is not advanced when such a 'settlement' affects countless others that were not a party to the agreement.[13]

The Court of Appeals summarized its decision as follows:

> In sum, the PSC exceeded its clear statutory authority when it approved the RDM in Case No. U-16568. The fact that the approval was accomplished in the context of a settlement does not transform the PSC's ultra vires act into a legal one. See, e.g., *Timney v Lin,* 106 Cal App 4th 1121, 1127; 131 Cal Rptr 2d 387 (Cal App, 2003) (stating that a strong public policy favoring settlement does not legitimize a settlement agreement clause that is contrary to law). We stress that our holding is based on the fact that reasonable minds could not have disputed the extent of the PSC's authority at the time it approved the settlement.[14]

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[11] *Enbridge*, 313 Mich App at 677.
[12] *Id*.
[13] *Id*. (citations omitted).
[14] *Enbridge*, 313 Mich App at 677. In its *Application* at p. v n2, UPPCo asserts that the Court of Appeals made a mistake in the first sentence of this cited passage. To the contrary, close reading of the Court of Appeals's decision, its holding, (*Enbridge*, p. 4), and this quoted concluding passage show that the Court of Appeals found error with the PSC's action in 2012 in U-16568 when it raised electric rates and upheld the RDM from the 2009 settlement agreement, and further erred by dismissing Enbridge's formal complaint. The Court of Appeals made no mistake in the language quoted here.

On February 2, 2016, UPPCo and the PSC sought leave to appeal the decision by the Court of Appeals by filing their respective applications, and on March 1 and 2 (a corrected filing), 2016, Enbridge filed its answering papers.

On October 7, 2016, this Court ordered the Clerk to schedule oral argument and ordered the parties to file supplemental briefs within 42 days addressing:

> (1) whether the Court of Appeals erred in holding that the analysis provided in *Dodge v Detroit Trust Co*, 300 Mich 575, 613 (1942), was relevant to the determination of whether the PSC exceeded its statutory authority by enforcing a settlement agreement that included a revenue decoupling mechanism for an electric utility;
>
> (2) if *Dodge* applies, whether the petitioner was barred from arguing that the settlement agreement is unenforceable or void; and
>
> (3) whether the petitioner is procedurally barred from challenging the PSC's prior orders when it failed to intervene in certain cases or appeal from the orders.

Order at 2.

LAW AND ARGUMENT

The applicable standard of review is presented here followed by Enbridge's supplemental briefing on the three issues identified by this Court, plus a fourth issue raised in connection with the same.

I. Standard of Review.

An application for leave to appeal to this Court must show that one of the grounds enumerated in MCR 7.305(B) is present.

Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, *prima facie*, to be lawful and reasonable.[15] A party, such as Enbridge, aggrieved by an order of the PSC, has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable.[16] To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment.[17]

A PSC order is considered unlawful if it is based on an erroneous interpretation or application of the law, and is considered unreasonable if the evidence does not support it.[18] In reviewing PSC decisions, a court may not substitute its judgment for that of the agency, but may not abandon or delegate its duty to interpret statutory language and legislative intent.[19]

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[15] *Michigan Con Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973).
[16] MCL 462.26(8).
[17] *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).
[18] *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259; 140 NW2d 515 (1966); *See, also Attorney General v Pub Serv Comm*, 249 Mich App 424, 429; 642 NW2d 691 (2002).
[19] *Attorney General v Pub Serv Comm*, 244 Mich App 401, 406; 625 NW2d 786 (2002).

Questions of statutory interpretation are questions of law, which are reviewed *de novo*.[20] If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent.[21]

An agency's interpretation of its enabling statutes is entitled to respectful consideration and, if persuasive, will not be overruled without cogent reasons. However, an agency's interpretation cannot conflict with the plain meaning of the statute, as so found by the Court of Appeals in this case. Although a court must consider an agency's interpretation, the court's ultimate concern is the proper construction of the plain language of the statute such that an agency's interpretation is not binding on the court.[22]

If this Court should grant the *Applications*, then it should adopt the same approach reviewing agency decisions as followed by the United States Supreme Court. It held:

> An agency's action must be upheld, if at all, on the basis articulated by the agency itself.[23]

In the same case, the United States Supreme Court also held as follows:

> We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner . . .[24]

These same principles should be followed by this Court when reviewing the May Order issued by the PSC, and the decision by the Court of Appeals to overturn the May Order.

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[20] *In re MCI Telecom Complaint*, *supra,* at 413; see also *Attorney General v Pub Serv Comm*, 247 Mich App 35, 39; 634 NW2d 710 (2001)
[21] *Tryc v Michigan Veterans Facility*, 451 Mich 129; 545 NW2d 642 (1996).
[22] *In re Complaint of Rovas against SBC Michigan*, 482 Mich 90, 108; 754 NW2d 259 (2008).
[23] *Motor Vehicles Mfrs Ass'n v State Farm Mut Auto Ins Co*, 463 US 29, 50,77; 103 S Ct 2856, L Ed 2d 443 (1983) (citations omitted).
[24] *Motor Vehicles Mfrs Ass'n*, 463 US at 48 (citations omitted).

II. The Court of Appeals Holding that the PSC Erred and Exceeded its Statutory Authority Found the Analysis in *Dodge v Detroit Trust Co*, 300 Mich 575, 613 (1942), was Inapposite and Factually Distinguishable.

The Court of Appeals ruled that the PSC violated MCL 460.1097(4) when it approved the use of the RDM for electric utility UPPCo to raise electric rates in August 2012, with full knowledge of the Michigan Court of Appeals decision in April 2012 that held that a plain reading of that statute forbade the PSC from approving the RDM. Enbridge agrees.

This Court directed the parties to brief the issue of whether

> the Court of Appeals erred in holding that the analysis provided in *Dodge*…was relevant to the determination whether the [PSC] exceeded its statutory authority by enforcing a settlement agreement that included a revenue decoupling mechanism for an electric utility.[25]

However, Enbridge submits that the Court of Appeals held only that the PSC exceeded its statutory authority, and did not make any direct holding concerning the 'relevance' of *Dodge* other than to find that *Dodge* was (i) "inapposite," or not pertinent, appropriate, or suitable, for the PSC and UPPCo to rely on under the facts presented in this case, because *Dodge* was (ii) factually distinguishable for two reasons. Review of the language used by the Court of Appeals illustrates those two points:

> **The PSC's reliance on *Dodge* is inapposite for two primary reasons**. **First, in the instant case, unlike in Dodge, there was no intervening change in the law.** MCL 460.1097(4) became effective in 2008 and has not been altered since. 2008 PA 295. Although *Detroit Edison* was issued after the PSC approved the settlement in this case, that fact is not dispositive. Even without the benefit of our decision in *Detroit Edison*, contrary to the PSC's claim that "it was unclear whether Act 295 [of 2008] permitted electric RDMs," **the act's language is unmistakably clear, and it was not reasonable to believe that the law was in dispute or otherwise unclear.** While the PSC could approve RDMs for gas utilities, it was not authorized to do so for electric utilities. **Second, the settlement in Dodge involved private parties, who only**

[25] October 7 *Order* at 2.

> **themselves were bound by the agreement. Here, as acknowledged by all the parties, settlements in the regulatory context carry the force of law and necessarily bind all consumers in the affected area, even those who were not parties to the agreement.**[Footnote omitted.] See *Ind Bell Tel Co, Inc v Office of Utility Consumer Counselor (On Rehearing)*, 725 NE2d 432, 435 (Ind App, 2000) ("[A] settlement agreement that must be filed with and approved by a regulatory agency 'loses its status as a strictly private contract and takes on a public interest gloss.'") (citation omitted). As a result, the strong public policy behind the long-standing doctrine that requires parties to be bound by their settlement agreements, *Plamondon v Plamondon*, 230 Mich App 54, 56; 583 NW2d 245 (1998)), simply is not advanced when such a "settlement" affects countless others who were not parties to the agreement.[26]

The Court of Appeals analyzed *Dodge* because of the PSC's and UPPCo's reliance on that authority. If there were any holding at all as to *Dodge's* relevance, it was that *Dodge* was not relevant to the determination of whether the PSC exceeded its statutory authority, because of the factual distinctions between *Dodge* and this utility ratemaking case.

III. Even if *Dodge* Applied, Michigan Law Does Not Bar – but Supports – Challenges of Prior Utility Rates Set by the Commission.

Even if *Dodge* applied to the facts of this case, this Court's common law jurisprudence concerning the legislative nature of the ratemaking process as delegated by the Legislature for review of prior rate orders would plainly allow Enbridge to challenge the RDM as unlawful after a Commission order were entered, such as the one entered in U-16568.

Michigan common law is clear that the first proper forum for Enbridge's complaint, as a party aggrieved by the PSC, is the PSC. The Michigan Supreme Court has found that "ordinarily, a party aggrieved by the provisions of a tariff or code should seek relief by an attack upon those provisions before the Public Service Commission and from it to the [Appellate] Court." *Valentine v Michigan Bell Tel Co*, 388 Mich 19, 26; 199 NW2d 182 (1972). Further, the question

[26] *Enbridge*, 313 Mich App at 677-678 (emphasis added).

of whether or not the Commission's approval of the RDM in this case should be before the PSC under the primary jurisdiction doctrine.

> Under the primary jurisdiction doctrine, a plaintiff seeking relief against a public utility may be required to forestall court action in favor of a hearing before the [PSC] when the plaintiff's claim falls within the jurisdiction of the [PSC]. [*Rinaldo's v Michigan Bell*, 454 Mich. 65, 70; 559 N.W.2d 647 (1997)]. The [PSC] has complete power to regulate all public utilities and their rates and conditions of service. MCL 460.6(1); MSA 22.13(6)(1). Its powers to investigate complaints by customers extend to matters anticipated by the regulatory scheme. MCL 460.58; MSA 22.8. Not all disputes between a customer and a public utility are subject to the [PSC]'s primary jurisdiction. Rather, the "question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Id.*, quoting *United States v Western PR Co*, 352 U.S. 59, 64; 77 S. Ct. 161; 1 L. Ed. 2d 126 (1956).[27]

Until the PSC entered the August 2012 Order in U-16568, Enbridge was not aggrieved, because it had not been damaged by increased utility rates, and reasonably expected that the PSC would follow Michigan law, as expressed by the Court of Appeals in *Detroit Edison*.

The language used by this Court in *Valentine* when considering aggrievement with the PSC is important here: it is in the past tense. Once aggrieved, Enbridge brought its grievance directly to the PSC, and did so by its filing in U-16568 of a petition for rehearing and in the alternative a formal complaint. The PSC merely deflected Enbridge's prompt action to bring its grievance before the body with primary jurisdiction over Enbridge's aggrievement with the electric tariff increase. See *Michigan Basic Prop Ins Corp*, above. The PSC decided only that Enbridge was not a party to U-16568, putting the form of Enbridge's assertion of its rights over the substance, and refusing to act on Enbridge's formal complaint. After the PSC determined that Enbridge was not a party to that proceeding, Enbridge did the next logical thing, consistent with

[27] *Michigan Basic Prop Ins Corp v Detroit Edison Co*, 240 Mich App 524, 530; 618 NW2d 32 (2000).

the primary jurisdiction doctrine, and this Court's expression of the ordinary recourse when dealing with a complaint about a an order of the PSC raising a utility tariff rate: Enbridge re-filed its formal complaint, which led to the instant proceeding and appeal, in Case No. U-17077.

The PSC later determined to be moot the arguments raised by the PSC Staff and UPPCo that Enbridge failed to timely intervene or appeal the Orders in U-16568.[28] Neither the PSC Staff nor UPPCo took exception to that PSC determination, and neither of those parties cross-appealed that issue in the Court of Appeals, and so it is not one properly before this Court on their applications.

In the proposal for decision (the "PFD") in this proceeding, to which Enbridge took exception, the ALJ placed significant weight on finality, holding that "finality could not be achieved if the complaint process were allowed to be used as an alternative to what is appropriately an appeal."[29] However, as Enbridge argued below in its Exceptions to the PFD, the case that the ALJ used to base his finding on, *CMS Energy Corp v Attorney Gen*, 190 Mich. App. 220 (1991), does not deal with a settlement agreement. Rather, *CMS Energy* deals with a contented case Commission determination made years earlier. *CMS Energy* can clearly be distinguished from the case at hand by the fact that in *CMS Energy*, "Consumers agreed to the letter and spirit of [the] condition [they were then challenging] in 1985, and reaffirmed its agreement in 1986, 1987, 1988, and 1989."[30]

The contrast with *CMS Energy* is plain: there, Consumers repeatedly affirmed contentment with the result. Here, Enbridge objected at every point after it was aggrieved by unlawful rates. Enbridge was not a party to the settlement agreement and at the time the settlement agreement was entered in 2009 and approved by the PSC in 2010, and though the

[28] May Order at 10.
[29] PFD at 11.
[30] *CMS Energy,* 190 Mich App at 229.

pilot RDM, as well as the settlement agreement, were considered *prima facie* to be valid, lawful and reasonable pursuant to MCL 462.25, the pilot RDM aggrieved no one because it raised no rates and was therein consistent with the spirit if not the letter of Michigan law. The pilot RDM provision of the settlement agreement was only discovered to be invalid when the Court of Appeals ruled in *Detroit Edison* in 2012. Enbridge, once aggrieved with unlawfully raised rates with the August 2012 Order in the face of lucid April 2012 Court of Appeals authority in *Detroit Edison*, asserted its discontent at every turn. Moreover, the PSC was put on notice of the binding precedent of *Detroit Edison* in exceptions filed by its own Staff counsel even before Enbridge objected to its unlawfulness, but the PSC failed to yield to this binding precedent.

The PSC and UPPCo might take the position that this event – the April 2012 ruling regarding the plain language of statutory authority for electric providers regarding RDMs – was an 'intervening change' of an uncertain point of law akin to that in *Dodge*. Such an argument would be without merit, for at least two reasons. First, the Court of Appeals made no 'change' in 2012 to the statute in question, and merely read it for what it said. Second, as the Court of Appeals correctly decided in the instant proceeding below, "the act's language is unmistakably clear, and it was not reasonable to believe that the law was in dispute or otherwise unclear."

The mere fact that the proceeding that resulted in the *Detroit Edison* decision in April 2012 was litigated does not, in itself, evidence the reasonableness of a belief that the law was in dispute or otherwise unclear. The fact remains that both the PSC and UPPCo had the benefit of review of the April 2012 *Detroit Edison* decision – as well as notice from counsel to the PSC Staff in exceptions filed shortly after the *Detroit Edison* decision was filed of the binding nature of that precedent – before deciding not to draw back their position to be consistent with Michigan law, and instead pressed the issue for a clearly unlawful RDM for an electric provider.

The argument asserted by the ALJ below that "finality could not be achieved if the complaint process were allowed to be used as an alternative to what is appropriately an appeal,"[31] flies in the face of the plain language of Section 25 of the Railroad Act, Act 309 of 1909, which provides:

> All rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable **until finally found otherwise in an action brought for the purpose pursuant to the provisions of section 26 of this act, or until changed or modified by the commission as provided for in section 24 of this act.**[32]

Such a holding would mean that no party could ever raise a complaint about the lawfulness of a rate before the Commission and would directly contradict the Supreme Court's holding in *Valentine* that "ordinarily, a party aggrieved by the provisions of a tariff or code should seek relief by an attack upon those provisions before the Public Service Commission and from it to the [Appellate] Court." *Valentine*, *supra*, at 26.

In an Order issued on March 6, 2014, *In Re the Application of Tilden Mining Company L.C. and Empire Iron Mining Partnership for an Order Requiring Wisconsin Electric Power Company to Amend its RAS-1 Tariff*, PSC Case No. U-17479, the Commission discussed the impact of MCL 462.24 on prior issued rate orders. MCL 462.24 provides:

> The commission may, at any time upon application of any person or any common carrier, and upon at least 10 days' notice to the parties interested, including the common carrier, and after opportunity to be heard as provided in section 22, rescind, alter or amend any order fixing any rate or rates, fares, charges or classifications, or any other order made by the commission, and certified copies shall be served and take effect as herein provided for original orders. (footnote omitted.)

In *Tilden Mining,* the Commission held that:

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[31] PFD at 11.
[32] MCL 462.25 (emphasis added).

> . . . an application may request that the Commission rescind, alter, or amend any previous order fixing rates. Interpreting MCL 462.24, the Michigan Supreme Court has found that the Commission retains continuing jurisdiction over rates, and that rates fixed by the Commission are always subject to revision. *City of Lansing v Public Service Comm*, 330 Mich 608, 612; 48 NW2d 133 (1951). The Commission has found that the language of MCL 462.24 "clearly indicate[s] that the Legislature intended that the Commission be fully authorized to reexamine its prior orders and take appropriate actions. . . . Moreover, this authority is wholly consistent with the principle that ratemaking is a legislative function that has been entrusted to the Commission. *Thus, it is clear that the Commission is fully authorized to undertake or legislate changes in the rates in response to changed conditions*." August 17, 1999 order in Case No. U-11290 *et al*., pp. 25-26.[33]

Likewise in the instant proceeding, the PSC was "fully authorized to undertake or legislate changes in the rates in response to changed conditions" because "the Legislature intended that the Commission be fully authorized to reexamine its prior orders and take appropriate actions." See *Tilden Mining Co*, above. Namely, the changed condition here was that the Court of Appeals has held that "that the Commission lacks authority to approve or direct the use of an RDM for an electric utility,"[34] which required the PSC to reverse and vacate its August 2012 Order and find that the surcharges established therein were unlawful and should be refunded to customers. The PSC did not do so, and this appeal resulted. This "changed

[33] *In Re the Application of Tilden Mining Company L.C. and Empire Iron Mining Partnership for an Order Requiring Wisconsin Electric Power Company to Amend its RAS-1 Tariff*, MPSC Case No. U-17479, Order issued March 6, 2014 at 9-10 (emphasis added).

[34] *In the Matter of the Application of Consumers Energy Company for Authority to Reconcile Electric Revenue for the December 2010 through November 2011 Period Pursuant to Pilot Revenue Decoupling Mechanism and for Other Relief*, MPSC Case No. U-16988, Order issued October 31, 2012. It should be noted that though two parties had filed Petitions to Intervene addressing the Court of Appeals Order, the Commission dismissed the Application without hearing even though the electric utility had specifically filed a letter noting that it would be commenting in other proceedings.

condition" was not, as a matter of law, any change to the law, as the Court of Appeals correctly noted in the instant proceeding below.[35]

As the PSC has recognized, this Court has found that the PSC "retains continuing jurisdiction over rates, and that rates fixed by the Commission are always subject to revision." See *City of Lansing*, cited above by the PSC in *Tilden Mining Co*. This recognition reflects the legislative nature of utility ratemaking, as delegated to the PSC by the Legislature. That the PSC is required to do so within the legal bounds of that delegated authority goes almost without saying, though in Michigan, the law is such that a doubtful power does not exist for a body like the PSC.

IV. Enbridge is Not Procedurally Barred from Challenging the PSC's Prior Orders, because Michigan Law Makes the PSC the Proper Forum for Review of Prior Legislative-Style Utility Rate Orders Set by the PSC and Resort to Appeal Is a Last Option.

As discussed above, the legislative nature of utility ratemaking, in addition to this Court's express authority concerning the proper forum for seeking redress of an injury caused by a prior PSC order, requires that the PSC is the proper forum for challenging a prior order entered by the PSC. See *Valentine*, above; see also *City of Lansing*, above. The same analysis applies to the question for both U-16568, where Enbridge was injured, which was the proceeding in which the PSC raised the tariff rates based on what was only a pilot RDM, as well as to U-15988, the proceeding in which the settlement agreement was approved by the PSC and included a pilot RDM. Those orders are both prior orders, and under Michigan law, the PSC retained jurisdiction to reconsider those orders and the rates set by them at any time after they entered.

There is a potential issue to consider here concerning whether Enbridge should be procedurally barred because it did not style its papers filed in U-16568 as a 'motion to

[35] *Enbridge*, 313 Mich App at 677.

intervene.' As discussed above, the PSC found this issue to be moot. In the instant proceeding, the PSC determined that Enbridge's failure to intervene in the prior proceeding was moot, and neither the PSC Staff nor UPPCo cross-appealed that or any other issue, including the PSC's determination that Enbridge's formal complaint met the requirements of PSC Rule 501.

The present proceeding is the first proceeding in which Enbridge has been afforded the opportunity to present the merits of its grievance with the Commission's ratemaking decision as to the unlawful rates based on a pilot RDM. As the body charged with setting utility rates on an ongoing basis and retaining jurisdiction to review the reasonableness and lawfulness of prior orders and rates, the Commission could have accepting Enbridge's filed papers in U-16568 as objecting to the substance of the August 12 Order as a motion to intervene to seek relief. Yet the PSC simply stated Enbridge was not a party and should not be heard in that case. Having stood on procedure in U-16568 with deaf ears to the merits of Enbridge's grievance, the PSC should not be allowed on procedural grounds to forever escape the merits of Enbridge's grievance, which Enbridge re-filed in short order to force the PSC to deal with its merits. Michigan law, as discussed above, fully supports the PSC's continuing jurisdiction to review its prior orders and make adjustments consistent with Michigan law. When pressed into reviewing the merits of Enbridge's grievance in the instant proceeding, the PSC's decision was simply wrong as a matter of law, as the Court of Appeals held in 2015.

All that said, the PSC Staff and UPPCo in this case did not cross-appeal that issue. Therefore, even were it the case that from a procedural perspective, Enbridge should have instead brought its grievance immediately to the Michigan of Appeals, appealing the PSC's stark refusal on procedural grounds to review the merits of Enbridge's grievance rather than seek substantive review at the PSC, the PSC Staff and UPPCo waived the right to challenge the lack

of intervention or appeal in U-15988 and U-16568, and should not be heard on those issues by this Court.

CONCLUSION AND REQUESTED RELIEF

Petitioner-Appellee Enbridge Energy, Limited Partnership respectfully requests that the Michigan Supreme Court deny both Respondent-Appellant/Appellee Upper Peninsula Power Company's *Application for Leave to Appeal* and Appellee/Appellant Michigan Public Service Commission's *Application for Leave to Appeal*.

Respectfully submitted,

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Dated: November 18, 2016

STATE OF MICHIGAN

IN THE SUPREME COURT

In Re Complaint of Enbridge Energy, Limited Partnership against Upper Peninsula Power Company,

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,
Petitioner-Appellee,

v

UPPER PENINSULA POWER COMPANY,
Respondent-Appellant,

and MICHIGAN PUBLIC SERVICE COMMISSION,
Appellee.

Supreme Court No. 153116
Court of Appeals No. 321946
PSC Case No. U-017077

/

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,
Petitioner-Appellee,

v

UPPER PENINSULA POWER COMPANY,
Respondent-Appellee,

and MICHIGAN PUBLIC SERVICE COMMISSION,
Appellant.

Supreme Court No. 153118
Court of Appeals No. 321946
PSC Case No. U-017077

/

SUPPLEMENTAL BRIEF OF APPELLEE ENBRIDGE ENERGY, LIMITED PARTNERSHIP

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STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

The undersigned, being first duly sworn, deposes and says that on the 18th day of November, 2016, she served a copy of the Supplemental Brief of Enbridge Energy, Limited Partnership upon:

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by enclosing copies of the documents and depositing same in the U.S. Mail and filing them with the Court's efiling system.

/s/Valerie J. Lawver
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